No. 86-883

Supreme Court, U.S.
FILED
DEC 9 1986
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1986

NESCCO, INC.,
Petitioner and Real Party in Interest,
for and on behalf of Storage Spaces
Designated Nos. "8" and "49"
Located at 277 Douglas, Visalia, California,
Defendant (C.A. No. 85-1085),

v.

UNITED STATES OF AMERICA,
Respondent and Plaintiff.

BALARAMA'S ENTERPRISES, INC.,
Petitioner and Real Party in Interest,
for and on behalf of 560 South Bridge Street,
Visalia, California, Defendant (C.A. No. 85-1086),

v.

UNITED STATES OF AMERICA,
Respondent and Plaintiff.

SUPPLEMENTAL APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JAY W. POWELL
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November 24, 1986

BOWNE OF SAN FRANCISCO, INC. • 190 NINTH ST. • S.F., CA 94103 • (415) 864 2300

16 pp

Appendix C

United States District Court
Eastern District of California

Mag. Docket No. 84-2306

United States of America,
Plaintiff,

v.

Storage Spaces Designated Nos. 8 and 49,
727 East Douglas, Visalia, California,
Defendants.

Mag. Docket No. 84-2307

United States of America,
Plaintiff,

v.

650 South Bridge Street,
Visalia, California,
Defendant.

Order
[Filed March 11, 1985]

On December 6, 1984, petitioner's motion for return of property and to suppress evidence was heard before the Honorable Robert E. Coyle, United States District Court for the Eastern District of California. David Rodriguez, Esq. appeared on behalf of petitioners Balarama Enterprises, Inc. and Nesco, Inc., the real parties in interest in regard to the above-described properties. Edward Moffat, Esq. was present as the representative of the United States. Argument was had and additional points and authorities submitted by petitioners. After full consideration of the papers filed and arguments presented by the parties, the court has reached the following conclusions.

No criminal charges have been filed against the real parties in interest in this case. It is therefore improper at this time to consider petitioners' motion as one to suppress evidence under Fed. R. Crim. Pro. 41(e). The motion must be treated as a civil action seeking to recover personalty and enjoin the unlawful use

thereof. *Weldon v. United States*, 196 F.2d 874 (9th Cir. 1952); *accord, Offices of Lakeside Non-Ferrous Metals v. United States*, 679 F.2d 778, 779 (9th Cir. 1982).

In the case at hand, the government has already returned to petitioners all the original business records seized from the premises located at 727 E. Douglas and 650 S. Bridge Street, Visalia, California. Those items remaining in the government's possession, listed as Exhibit A attached, were lawfully seized pursuant to a valid warrant and may therefore be utilized by the government in any subsequent administrative or criminal proceeding.

The affidavit executed by the United States Food and Drug Administration agent Robert J. Anderson provides information sufficient to establish probable cause to believe that 21 U.S.C. §§ 331(a) and (k) had been violated at the locations in question. In the affidavit offered in support of the application for a search warrant, agent Anderson related in detail his lengthy investigation of activities at and related to the premises described above, which included the purchase of misbranded and mislabeled products from petitioner Balarama Enterprises, Inc. and an account of the irregularities personally observed by the affiant during a lawful administrative inspection of petitioners' packaging facility, located at 650 S. Bridge Street in Visalia. In addition, the affiant obtained the consent of the owner of the storage units located at 727 E. Douglas to search the units leased to petitioners, and upon his lawful entry therein observed misbranded and mislabeled items of the type later listed in the affidavit and seized from those units. All of this information was incorporated by reference into the application for a search warrant and presented to a neutral magistrate. Finding probable cause to search the premises, the magistrate properly issued a warrant to search for and seize items identical to those purchased by the FDA agents, those lawfully observed by affiant, and generic items for which objective articulable standards were provided. *See United States v. Hillyard*, 677 F.2d 1336, 1339-40 (9th Cir. 1982). The numerous items found on the premises, whether specifically identified in the warrant or clearly falling within the generic category articulated in section 15 of that document, were properly seized. *See United States v.*

Offices Known as 50 State Distributing Co., 708 F.2d 1371, 1374 (9th Cir.), *cert. denied*, ____ U.S. ____, 104 S.Ct. 1272 (1983).

Therefore, petitioners' motion for the return of property seized by the United States is hereby denied.

IT IS SO ORDERED.

DATED: March 11th, 1985.

/s/ ROBERT E. COYLE
Robert E. Coyle
United States District Judge

EXHIBIT "A"

Inventory of Items Seized from Storage Units Nos. 8 and 49

Peruvian Flake	15/24/⅛ oz. bottles 285/⅛ oz. bottles 66/¼ oz. bottles 360/½ oz. bottles 56/1 oz. bottles 1,611/1 gm. bottles
Quinine Hydrochloride N.F.	7/25 kg. drugs—imported
Lidocaine Hydrochloride...	5/50 kg. drums—no label
Roxanthin Red 10	1/50 kg. drum
Unlabeled White Powder ..	1/50 kg. drum
Quinine Hydrochloride	1/25 kg. drum—H. Reisman
Toot-The Heavenly Incense	14 boxes/24/1 doz./2.75 gm. 22/1 doz./2.75 gm. +3/2.75 gm.
Super Toot	7/12/1 oz. bottles 12/1 oz. bottles 16/12/½ oz. bottles 3/1.5 gm. bottles
Summa Cense	1/48/1 oz. bottles
Base-O-Scent	722/1 gm. bottles 84/¼ oz. bottles ⅛ oz. bottles 3/1 lb. bottles
Nesco Procaine HCl	12/8 oz. bottles 84/4 oz. bottles
Unlabeled White Powder (est. ½ oz. bottles)	47/12/X oz.
Nesco Lidocaine HCl	18/4 oz. bottles
Ultra Scent	13/1 lb. bottles
Technicians Quinine HCl	117/12/1 oz. bottles 2/12/8 oz. bottles ⅛ oz. bottle ¼ oz. bottle 11/1 lb. bottles 4/1 oz. bottles
Bolivian Rock (on cards) ..	446/1 gm. bottles 526/¼ gm. bottles 64/½ gm. bottles 1336/⅛ gm. bottles 50/X oz. (no weight) bottles

Ephedrine Sulfate (no labels on bottles) 20/4 oz.
(note in box states Eph. Sul.)

Super Caine	210/1 gm. bottles 85/¼ oz. bottles 17/½ oz. bottles 305/⅛ oz. bottles
Technicians Benzocaine USP	12/12/4 oz. bottles 50/8 oz. bottles
Summa Caine	89/2 gm. bottles 90/6 gm. bottles
De Blanco.....	36/1 oz. bottles 94/5 gm. bottles + 74/½ oz. bottles
White Flame	12/8 oz. unlabeled bottles 22/1 oz. bottles 18/5 gm. bottles 15/X oz. no weight bottles 1/1.5 gm. bottles
Milky Trails	10/1 lb. bottles 16/1 gm. bottles 24/1 oz. bottles 20 bottles no weight
Base-O-Caine.....	242/½ oz. bottles 141/1 oz. bottles 69/¼ oz. bottles 317/⅛ oz. bottles 645/1 gm. bottles 600/X gm. bottles (no weight) 100 bottles (no weight)
Pseudo Scent	111/1.5 oz. bottles 125/1 oz. bottles 36/5 oz. bottles 106/X oz. (no weight) bottles
Rock Crystal Ultra Caine..	228/¼ oz. bottles 51/12/½ oz. bottles 240/½ oz. bottles 72/⅛ oz. bottles 309/25 gm. bottles 340/1 gm. bottles
Super Scent Rock Incense	24/1 oz. bottles
Rock Crystal Ultra Scent..	528/1 oz. bottles 12/1 gm. bottles 972/⅛ oz. bottles 27/¼ oz. bottles 7/6/½ oz. bottles
Alchemist Benzocaine USP	23/2 oz. bottles
Real Caine	56/2 oz. bottles
Super Scent	104/½ oz. bottles

Unlabeled White Crystal Powder	37/X oz. bottles (no weight) 578/1.5 oz. bottles (no weight)
Close Enough.....	34/1 oz. bottles
Super Flake	13/¼ oz. bottles
Real Scent	2 plastic tubs (est. 5l bs.) 22/7 oz. bottles 3/1¼ oz. bottles
Unlabeled White Crystal Powder	110/X oz. (no weight) bottles 1/X oz. (no weight) bottles 228/1.5 gm. bottles
Pseudo Caine	38/1.5 oz. bottles
Ps. Eph. Sul. (white powder thought to be Pseudophedrine Sulfate)	Est. 10 lbs.
Eph. HCl (white powder thought to be Ephedrine HCl)	Est. 5 lbs.
Unlabeled bottles White Powder	7/½ oz. (one labeled Benzocaine)
1 sack	1/½ oz. bottles Super Scent 8/⅛ oz. bottles Rock Crystal Ultra Scent 2/¼ oz. bottles Rock Crystal Ultra Scent 2/½ oz. bottles Rock Crystal Ultra Scent ¼ oz. bottles Technicians Benzocaine USP 2/1 oz. bottles Peruvian Flake 1/1 oz. bottle Rock Crystal Ultra Scent 1/1 oz. bottle Close Enough 1/¼ oz. bottle Base-O-Caine 2/¼ oz. bottles Super Caine 2/½ oz. bottles Super Caine 5/⅛ oz. bottles Bolivian Rock 4/¼ oz. bottles Base-O-Scent 6/¼ oz. bottles Peruvian Flake 2 sm. gm. vials—no label
1 carton.....	2 unlabeled bottles white powder—3 oz. 1/1000 capsule bottles Super Diet Aid 1/100 capsule bottles Pseudo-Plus 2/202 bottles Perfect Cense 1/6 oz. bottles Perfect Cense 7/5 gm. bottles Sintho Caine

4 hot boxes

68 carved drug boxes (pocket Sized)

1 carton of label rolls as follows: .....
White Flame 1 oz.
White Flame 5 gm.
White Flame 8 oz.
White Flame 1.5 gm.
Pseudo Scent 1 oz.
Pseudo Scent 5 gm.
Pseudo Scent 1.5 gm.
Close Enough 1 oz.

1 carton of labels as follows:
1 roll Blank Nescco labels
1 roll Nescco Procaine HC1 USP ½ oz.
1 roll Nescco Procaine HC1 USP 8 oz.
1 + roll Nescco Procaine HC1 USP 4 oz.
5 rolls Nescco Lidocaine HC1 ½ oz.
5 rolls Nescco Lidocaine HC1 4 oz.
2 rolls Nescco Lidocaine HC1 8 oz.
1 + rolls Nescco Lidocaine HC1 1 lb.
1 roll Nescco Lidocaine HC1 ½ oz.
2 rolls Procaine HC1 1 oz.

Inventory of Items Seized from 650 S. Bridge Street

3 rolls of labels: .....
Caffeine Anhydrous
Caffeine Anhydrous
Quinine HCL

Technicians Caffeine Anhydrous .....
12/1 oz. bottles

1 carton containing: .....
1/1 gm. vial Peruvian Flake
1/½ oz. bottle Vitamin B Complex
1/1 oz. bottle Technicians Crystallized Mannitol
12 hand held balance scales
2 boxes cigarette papers

1 carton containing: .....
18/.40 oz. Rush
1/12/1 oz. Sparkling Beauty Mannitol
1/12/½ oz. Sparkling Beauty Mannitol
1/500 gm. Star Label Lactose
1/500 gm. Mallinckrodt Lactose
1 small bottle Trugger Chemical Co. Mannitol

1 carton containing: .....
27/5 gm. White Flame
1/½ oz. Peruvian Flake
1/⅛ oz. Rock Crystal Ultra Caine
1/½ oz. Super Flake

Appendix D

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Attorneys for Appellants and
Real Parties in Interest

In the United States Court of Appeals
For The Ninth Circuit

C.A. No. 85-1085
Mag. Dkt. No. 84-2306 (REC)

United States of America,
Plaintiff/Appellee,

vs.

Storage Spaces Designated No. "8" and "49" Located at
727 East Douglas, Visalia, California,
Real Party in Interest/Appellant.

C.A. No. 85-1086
Mag. Dkt. No. 84-2307 (REC)

United States of America,
Plaintiff/Appellee,

vs.

650 South Bridge Street, Visalia, California,
Defendant,
and
Balarama's Enterprises, Inc.,
Real Party in Interest/Appellant.

Motion for Late Filing of Petition for Rehearing and
Suggestion for Rehearing En Banc

Appellants and real parties in interest, by and through their undersigned counsel, hereby move for an Order permitting the late filing of appellants' Petition for Rehearing and Suggestion for

Rehearing En Banc. This motion is made pursuant to Rule 26(b) of the Federal Rules of Appellate Procedure and Rule 13(d) of the Rules of the United States Court of Appeals for the Ninth Circuit, and the attached Declaration of David F. Rodriguez, counsel for appellants.

Dated: December 26, 1985.

ISHAM, MACIAS, LYNCH,
CRONIN & RODRIGUEZ

By /s/ DAVID F. RODRIGUEZ
David F. Rodriguez
Attorneys for Appellants and
Real Parties in Interest

DECLARATION OF DAVID F. RODRIGUEZ

I, DAVID F. RODRIGUEZ, declare:

1. That I am an attorney at law licensed to practice in all courts of the State of California, and also in the United States Court of Appeal for the Ninth Circuit, and I am co-counsel for appellants and real parties in interest;

2. That the Opinion of the panel was rendered on December 3, 1985;

3. That the panel's Opinion was served by mail and received by counsel for appellants and real parties in interest on December 9, 1985;

4. That in accordance with Rule 40(a) and Rule 26(c) of the Federal Rules of Appellate Procedure, I calculated the due date for a Petition for Rehearing and a Suggestion for Rehearing En Banc as being December 20, 1985;

5. That upon receipt of the Opinion of the Court on December 9, 1985, I began a diligent effort to prepare the Petition for Rehearing and Suggestion for Rehearing En Banc, while also being assigned to handle a number of other matters pending on other cases I am responsible for;

6. That due to a number of revisions of the Petition for Rehearing and Suggestion for Rehearing En Banc to comply with Rule 40 of the Federal Rules of Appellate Procedure, the completion of the Petition for Rehearing and Suggestion for Rehearing En Banc was not concluded until December 20, 1985;

7. That on the morning of December 20, 1985, a courier was obtained in order to take the Petition and suggestion to San Francisco for filing on December 20;

8. That on the morning of December 20, 1985, I called the Clerk for the Ninth Circuit assigned to the Eastern District of California and inquired whether mailing of the Petition and Suggestion on December 20 would constitute timely filing thereof, and I was advised that mailing on the date of December 20, 1985 would be sufficient;

9. That I then made efforts to insure that the package containing the original and requisite number of copies for a Petition for Rehearing and Suggestion for Rehearing En Banc was mailed by December 20;

10. That pursuant to Rule 26(c) of the Federal Rules of Appellate Procedure, which provides that three days shall be added to the prescribed period after service of a papaer by mail, I added three days to the 14 days for filing a Petition for Rehearing or Suggestion for Rehearing En Banc as provided in Rule 40 of the Federal Rules of Appellate Procedure, making the due date for filing December 20 rather than December 17;

11. That on the morning of December 26, 1985, I was advised by a deputy clerk of the Court that the Petition for Rehearing and Suggestion for Rehearing En Banc was received three (3) days late, which prompted this instant motion for late filing of appellants' Petition for Rehearing and Suggestion for Rehearing En Banc;

12. That upon being advised of the necessity for the instant motion, I attempted to contact Assistant United States Attorney Edward P. Moffat, counsel for appellee, United States of America. I was advised, however, that Mr. Moffat is on annual leave for Christmas week and was out of town and unavailable;

13. That had I been able to reach Mr. Moffat, I do not believe he would have any objection to appellants' motion for late filing of their Petition for Rehearing or Suggestion for Rehearing En Banc;

14. That had I known of the actual date being December 17, 1985, I would have, pursuant to Rule 26(b) of the Federal Rules of Appellate Procedure and Rule 13(d) of the Rules of the United States Court of Appeal for the Ninth Circuit, applied for an order extending time in which to file appellants' Petition for Rehearing and Suggestion for Rehearing En Banc;

15. That from the date of receipt of the panel's Opinion, being December 9, 1985, appellants filed their Petition for Rehearing and Suggestion for Rehearing En Banc 11 days thereafter; and

16. That the Petition for Rehearing and Suggestion for Rehearing En Banc has been filed by appellants and real parties in interest on the good faith belief that consideration by the full Court is necessary to secure and maintain uniformity of its decisions with regard to the standard of particularity in a search warrant and because such standard of particularity involves a question of exceptional importance.

WHEREFORE, I pray that an Order be issued permitting the late filing of appellants' and real parties in interest's Petition for Rehearing and Suggestion for Rehearing En Banc which was received and lodged with the Court three days late.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Executed this 26th day of December 1985 at Visalia, California.

/s/ DAVID F. RODRIGUEZ
David F. Rodriguez

Appendix E

United States Court of Appeals
For the Ninth Circuit

No. 85-1085
Eastern California

United States of America,
Plaintiff-Appellee,

vs.

Storage Spaces Designated Nos. "8" and "49"
Located at 277 East Douglas, Visalia, Calif.,
Defendant,

and

NESCCO, Inc.,
Real Party in Interest-Appellant.

No. 85-1086

United States of America,
Plaintiff-Appellee,

vs.

560 South Bridge Street, Visalia, California,
Defendant,

and

Balarama's Enterprises, Inc.,
Real Party in Interest-Appellant.

Order
[Filed July 30, 1986]

Before: CHOY, HUG, and SCHROEDER, Circuit Judges.

Appellants' motion for late filing of a petition for rehearing and suggestion for rehearing en banc is granted.

The clerk shall file the petition for rehearing and suggestion for rehearing en banc, which was lodged on December 23, 1985.

Appendix F

United States Court of Appeals
For the Ninth Circuit

No. 85-1085
Eastern California

United States of America,
Plaintiff-Appellee,

vs.

Storage Spaces Designated Nos. "8" and "49"
Located at 277 East Douglas, Visalia, Calif.,
Defendant,

and

NESCCO, Inc.,
Real Party in Interest-Appellant.

No. 85-1086

United States of America,
Plaintiff-Appellee,

vs.

560 South Bridge Street, Visalia, California,
Defendant,

and

Balarama's Enterprises, Inc.,
Real Party in Interest-Appellant.

Order
[Filed August 27, 1986]

Before: CHOY, HUG, and SCHROEDER, Circuit Judges.

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no judge of the court has voted to grant rehearing en banc. Fed.R.App.P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.